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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 648 and 697

[Docket No. 130319263-4284-03]

RIN 0648- BD09

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Final Rule to Allow Northeast Multispecies Sector Vessels Access to Year-Round Closed Areas

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final rule finalizes an interim final rule approving a sector exemption request that allows Northeast multispecies (groundfish) sector vessels restricted access to portions of the Nantucket Lightship Closed Area under standard monitoring coverage levels. This action also responds to public comments received on the interim measures. This final rule does not modify any measures from the interim final rule.

DATES: Effective [Insert date of publication in the Federal Register], we confirm the effective date of December 31, 2013 through April 30, 2014, of the interim final rule published on December 16, 2013 (78 FR 76077).

ADDRESSES: A copy of the accompanying environmental assessment is available from the NMFS Greater Atlantic Regional Fisheries Office: John K. Bullard, Regional Administrator,

National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also accessible via the Federal eRulemaking Portal: <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: William Whitmore, Fishery Policy Analyst, phone (978) 281-9182, fax (978) 281-9135.

SUPPLEMENTARY INFORMATION:

Background

Framework Adjustment 48 to the Northeast Multispecies (groundfish) Fishery Management Plan (78 FR 26118; May 3, 2013), included a provision allowing sectors to request exemptions from the year-round groundfish mortality closures to provide additional fishing opportunities. On December 16, 2013 (78 FR 76077), NMFS published an interim final rule allowing groundfish sector vessels restricted access to the Eastern and Western Exemption Areas within the Nantucket Lightship Closed Area. The interim final rule modified monitoring requirements for vessels fishing in the Eastern and Western Exemption Areas from the proposed rule by reducing the 100-percent industry-funded at-sea monitoring requirement for these areas to current at-sea monitoring coverage levels. The interim final rule also disapproved sector vessel access to Closed Areas I and II. This final rule retains the measures implemented in the interim final rule and responds to comments received on the interim final rule.

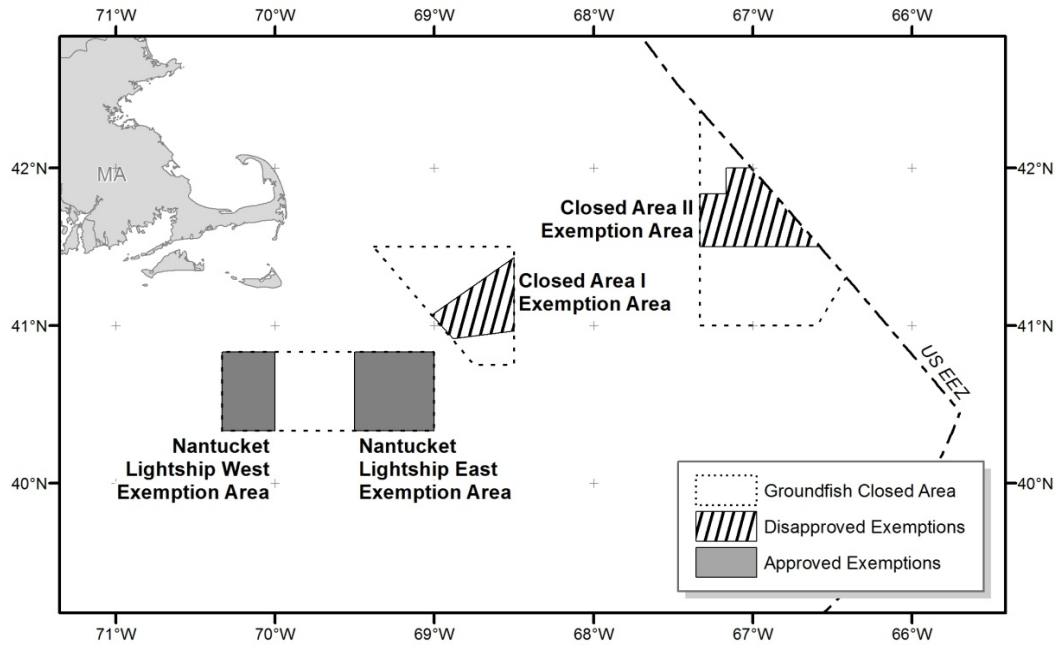
Approval of an Exemption Request Allowing Sector Vessels into Portions of Nantucket Lightship Closed Area

This final rule allows sector vessels to fish with selective gear in the Eastern and Western Exemption Areas within the Nantucket Lightship Closed Area for the duration of fishing year 2013, i.e., through April 30, 2014 (see Figure A). Justification for this decision is explained in the interim final rule (78 FR 76077; December 13, 2013). Trawl vessels are restricted to using

selective trawl gear, including the separator trawl, the Ruhle trawl, the mini-Ruhle trawl, rope trawl, and any other gear authorized by the New England Fishery Management Council (Council) in a management action. Flounder nets are prohibited in this area. Hook vessels are permitted and gillnet vessels are restricted to fishing 10-inch (25.4-cm) diamond mesh or larger. Gillnet vessels are required to use pingers when fishing in the Western Exemption Area from December 1–May 31, because this area lies within the existing Southern New England Management Area of the Harbor Porpoise Take Reduction Plan. It should be noted that the proposed rule to approve 2014 Sector Operations Plans and exemption requests (79 FR 14639; March 17, 2014) proposes to allow standard otter trawls in the Western Exemption Area for the 2014 fishing year. The interim final rule modified the monitoring requirements for vessels fishing in the Eastern and Western Exemption Areas by reducing the at-sea monitoring coverage level. There are several reasons why we reduced the coverage level to be consistent with standard coverage levels outside of the closed areas. The coverage level was relaxed from the proposed 100-percent industry-funded level because we recognized that there were fewer risks with opening the Nantucket Lightship Closed Area given that this area was originally closed to protect Southern New England/Mid-Atlantic yellowtail flounder and this stock is no longer overfished or undergoing overfishing. We also required selective gear to be used in this area that further reduced the potential for groundfish catch. Because we did not open Closed Areas I and II, and because we do not anticipate an increase in fishing effort after opening the Eastern and Western Exemption Areas, we expect to be able to fund the standard level of monitoring coverage in these areas. This provides increased flexibility for sector vessels because vessels can fish in a new area with no additional monitoring costs in fishing year 2013.

This final rule maintains the 22-percent monitoring coverage requirement for the Eastern and Western Exemption Areas for the remainder of fishing year 2013.

Figure A – Approved and Disapproved Sector Exemptions for Closed Area Access for Fishing Year 2013



Disapproval of Exemption Requests to Fish in Portions of Closed Areas I and II

Although we considered allowing access to fish in portions of Closed Areas I and II in the proposed rule, in the interim final rule we did not approve sector exemption requests that would allow sector vessels to fish in those areas. We disapproved access for the reasons summarized below. Comments in response to the interim final rule do not provide us with justification to revise our decision.

Our proposal to allow access to these areas was based on a balance of potential economic opportunity and increased efficiency with cost-effective monitoring and fish stock protections. In our interim final rule, we disapproved sector exemption requests to access portions of Closed Areas I and II for several reasons. Comments on the proposed rule submitted by some industry members and environmental organizations indicated that the increase in catch rates from Closed Areas I and II would likely not exceed the increased expense of having to pay for an at-sea monitor on board. Further, all comments submitted by the fishing industry claimed that they were unwilling to pay for the necessary monitoring coverage in any of the closure openings. Because of this and our concern about the potential impacts from opening these closed areas on Georges Bank cod and yellowtail flounder (stocks are both overfished and subject to overfishing), it did not seem prudent to open these areas.

Lastly, the action proposed to allow sector groundfish vessels into Closed Areas I and II until December 31, 2013. The deadline was imposed to protect spawning Georges Bank cod and haddock. Because that time has since passed, there is no possibility of opening the areas following the interim final rule.

Future Access into Closed Areas

In fishing year 2014, we remain unable to fund monitoring costs for exemptions requiring a 100-percent at-sea monitor coverage level. We explained in the interim final rule that we are interested in gathering additional data from Closed Areas I and II through exempted fishing permits to determine if this coverage level can be reduced. As a result, we are working with the Northeast Fisheries Science Center (Center) to develop a short-term exempted fishing permit (EFP) that would allow a small number of groundfish trips into Closed Areas I and II using the Center's Study Fleet vessels. For more information on the Study Fleet, visit <http://www.nefsc.noaa.gov/read/popdy/studyfleet/>. We have also received an industry-led EFP request to access portions of Closed Areas I and II, which we are currently evaluating and discussing with the applicants. Results from these and any other potential EFPs could better inform the industry, public, and NMFS, regarding the economic efficacy of accessing Closed Areas I and II, while providing needed information concerning bycatch of groundfish stocks of concern. This information could then help industry determine if it is economically worthwhile to request access to these areas in the future (via a sector exemption request). It will also help the Center determine whether it may be practicable to allow a limited number of observed vessels to fish in Closed Areas I and II. For the reasons stated in the interim final rule, we have concerns with providing access to these areas with less than 100% coverage; however, we intend to evaluate results from any approved EFPs to determine if we could justify access at a less than 100-percent at-sea monitor coverage level.

Comments and Responses

Comments on the interim final rule were submitted by the Northeast Seafood Coalition, the Georges Bank Cod Fixed Gear Sector, and the Massachusetts Division of Marine Fisheries. The Northeast Seafood Coalition and the Massachusetts Division of Marine Fisheries

commented primarily on our justifications for disapproving industry access into Closed Areas I and II. They also commented on our rationale for requiring 100-percent industry-funded at-sea monitoring when accessing those areas. Further, they both argued that our decision reveals a lack of trust in fishermen and confidence in the sector management system. The Massachusetts Division of Marine Fisheries requested clarification on comments we made about the catchability of Georges Bank haddock and suggested developing a pilot research program that is not scientifically focused. The Georges Bank Cod Fixed Gear Sector commented that vessels fishing in the Eastern and Western portions of the Nantucket Lightship Closed Area should only be subject to the 8-percent observer coverage provided by the Northeast Fisheries Observer Program.

Comment 1: The Northeast Seafood Coalition contends that the rationale for denying sector vessels access to Closed Area I and II appears to be based on “subjective fears and speculation with little or no real scientific or analytical evidence to support the decision.”

Response: We analyzed general sector exemption requests from year-round closed area exemption requests separately in fishing year 2013, and developed a specific Environmental Assessment (EA) for this action so that we could better analyze the exemptions and potential costs and benefits that may result from opening these closed areas. The closed area access EA utilized and expanded upon data developed for the Framework Adjustment 48 EA. The EA included recent analyses developed by the New England Fishery Management Council’s Closed Area Technical Team to incorporate the best available science. We utilized a variety of analyses including, but not limited to; habitat assessments using the Swept Area Seabed Impact (SASI) model, catch per unit effort comparisons inside and outside of closed areas, species distribution

maps, species length and frequency comparisons inside and outside of closed areas, and standard and selective gear performance inside and outside of closed areas.

Conclusions in the EA revealed relatively weak incentives for fishing inside Closed Areas I and II. The cumulative effects analysis suggests that opening the closed areas as proposed could likely result in low positive impacts to human communities, while resulting in impacts ranging between low negative to negligible to the physical and biological environments (see Table 44 in the Environmental Assessment). Because we relied on these analyses, we disagree that the basis for denial was speculative and not based on real scientific or analytical evidence.

We acknowledge that there is some uncertainty in the analyses within the EA, but this is why we took more of a precautionary approach when considering access to closed areas. For reasons discussed in the interim final rule (78 FR 76077, page 76079) we consider it necessary that every trip in Closed Area I or II be monitored to ensure that we are able to closely monitor catch in a timely fashion and can rescind the exemption if it is determined that the catch could be detrimental to rebuilding efforts. There was strong opposition to this by many members of the fishing industry who commented that they would not utilize the exemptions if they had to pay for monitoring coverage. Yet there was some support for comprehensive monitoring by several industry groups, as well as members of environmental organizations.

Our proposal to allow access to Closed Areas I and II was based on a balance of potential economic opportunity and efficiency with cost-effective monitoring and fish stock protections. Industry's insistence that they would not fish in Closed Areas I and II if they had to pay for a monitor reduced any speculation we had about the potential benefit of opening the area. It further convinced us that without more information about the catch available in these areas,

opening Closed Areas I and II was not worth the potential environmental risks. Comments on the interim final rule submitted by the Massachusetts Division of Marine Fisheries support this conclusion.

As explained above, we are developing an exempted fishing permit program to gain additional information on potential environmental impacts and the economic viability of fishing in Closed Areas I and II. The findings from this research could help provide industry with better catch information for potential future trips into Closed Areas I and II.

Comment 2: Both the Northeast Seafood Coalition and Massachusetts Division of Marine Fisheries argue that our response and rationale for disapproving access to Closed Areas I and II suggests that we lack confidence in the output control system (i.e., an annual catch limit) that sectors are held to.

Response: Groundfish are not managed solely through an output control/hard quota system. While Amendment 16 to the groundfish plan implemented annual catch limits for sectors and accountability measure, should those limits be exceeded, the fishery is also managed through area closures that protect essential fish habitat and spawning aggregations.

The groundfish mortality closures that this action considered granting exemptions from were established to protect stocks, such as Georges Bank cod and yellowtail flounder, that are currently overfished and subject to overfishing. We do not believe that it is appropriate at this time to increase fishing efforts in areas where these stocks reside without catch information from monitoring every trip. The upcoming Omnibus Habitat Amendment 2 is reconsidering which areas should be closed to protect essential fish habitat and juvenile groundfish. Until that amendment is implemented, we will continue to utilize approved closed areas as necessary to meet the goals and objectives of the groundfish plan.

As explained in the response to Comment 26 in the interim final rule, sector vessels are not exceeding their allocations, yet many key groundfish stocks are struggling to rebuild. We do not lack confidence in the sector system; however, we do believe that additional measures, such as closed areas to further protect juvenile and spawning fish, are vital to help rebuild overfished groundfish stocks.

Comment 3: The Northeast Seafood Coalition contends that NMFS has shown a “clear prejudice” against fishermen’s ability to target fish and fish lawfully. While commending our concerns about the potential for illegal discarding, Massachusetts Division of Marine Fisheries questions the need for 100-percent monitoring coverage inside Closed Areas I and II when substantially less coverage is required outside.

Response: Comment 18 of the interim final rule (78 FR 76077, page 76085) explains why we consider additional coverage necessary for these closed areas. We also re-summarized above that it is important to closely monitor catch so that we can react appropriately if unanticipated, negative impacts on fish stocks occur. We assert that trips into areas that have been closed to groundfish fishing for two decades should be closely monitored, at least for an initial time period. We disagree that requiring greater monitoring shows prejudice against fishermen. In fact, many comments submitted by the fishing industry, such as the Cape Cod Commercial Fishermen’s Alliance, Penobscot East Resource Center, and Maine Coast Fishermen’s Association, supported our requirement for 100-percent monitoring coverage.

Because these areas have not been fished by groundfish fishermen for decades, fishermen have little recent experience or knowledge of where fish are located and how many fish could be there. A higher uncertainty in this area could result in unanticipated catches. It is not prejudicial, only appropriately cautious, to consider that the mixing of potentially large George

Bank haddock catches, with very low quotas for Georges Bank cod and yellowtail flounder, could potentially result in an increased incentive to illegally discard in these areas.

Comment 4: The Northeast Seafood Coalition claims that the actions by NMFS are opposite of the Council's intent.

Response: Similar comments on the proposed rule are addressed in Comment 19 in the interim final rule (78 FR 76077, page 76086). In summary, the Council elected through Framework 48 to allow sectors to request access to year-round groundfish closed areas through the sector exemption process. NMFS approved this action and agreed during the development of Framework 48 that we would consider such exemption requests. NMFS, not the Council, develops and reviews sector exemptions. The Regional Administrator has the authority to consider, approve/disapprove, and modify sector exemption requests to ensure that the exemptions are consistent with the Magnuson-Stevens Act National Standards and the groundfish plan's goals and objectives. We completed an extensive analysis of the sectors request to access the year round closed areas and found that the potential costs exceeded the benefits of opening Closed Areas I and II.

Comment 5: The Northeast Seafood Coalition contends that we could have allowed vessels to better harvest their remaining allocations of Georges Bank cod and yellowtail flounder by letting vessels fish in Closed Areas I and II. They argue that allowing vessels into those areas would have allowed them to better target Georges Bank haddock, pollock, and redfish without having to worry about bycatch of choke stocks such as American plaice and witch flounder.

Response: We initially proposed access to Closed Areas I and II to do exactly as the Northeast Seafood Coalition suggests. This action was developed to provide sector vessels with the opportunity to access Closed Areas I and II to increase their Georges Bank haddock catch.

However, because of the need to monitor catch on each trip in near real-time, along with a lack of historical catch data, every trip needed to be monitored. After explaining that we could not pay for the additional monitoring coverage, industry responded that they would not fish in the closed areas because the benefits would not exceed the monitoring costs. As a result, we did not open Closed Areas I and II.

Comment 6: The Northeast Seafood Coalition suggests that a decrease in fishing effort for the 2013 fishing year should result in a surplus of monitoring funds that could be used to cover fishing trips into Closed Areas I and II.

Response: Currently, staff from the Science Center are still analyzing SBRM sea day needs and target coverage rates to meet the required mandates for catch monitoring and the SBRM, and identifying available resources. We are unable to determine whether there is a surplus of monitoring funds at this time.

Second, access for Closed Areas I and II was only proposed until December 31, 2013, rendering this comment moot.

Comment 7: Massachusetts Division of Marine Fisheries requested that we clarify our position on haddock abundance and why access to Closed Areas I and II will not give fishermen needed opportunities to catch more of the allocation and optimum yield.

Response: In the interim final rule, we explained that current low catches of haddock, along with some fishermen commenting that they are having a difficult time catching Georges Bank haddock, suggests that “opening Closed Areas I and II would not lead to significant increases in haddock catch.”

As of March 4, 2014, only 8.7 percent of the Georges Bank East haddock quota has been landed, and 7.8 percent of the Georges Bank West haddock quota has been landed, with only two

months remaining in fishing year 2013. This means that there are plenty of haddock that remain uncaught. If a significantly larger portion of haddock were available in the portions of Closed Areas I and II that we had proposed to open, surely the increased revenue from the catch would have offset the expense of having a monitor on board. The Massachusetts Division of Marine Fisheries agreed with this rationale within its comments. This conclusion is also supported by the EA for this action, which did not find a statistically significant larger amount of haddock within the portions of Closed Areas I and II that we were considering opening, during the time period we were proposing (see the swept area analyses in section 4.1.2 as well as the economic impacts in section 5.1.5). The EA concluded that access to these areas would likely result in low positive impacts to fishermen and fishing communities.

Massachusetts Division of Marine Fisheries said that we based our “decision on a likely lack of haddock” in the closed areas. This is incorrect. Fishermen having a difficult time harvesting haddock was only one of several reasons why we did not allow fishermen into Closed Areas I and II. Other reasons include potential impacts on Georges Bank cod and yellowtail flounder stocks as well as a lack of economic opportunity and increased efficiency evidenced by industry’s willingness to pay for monitoring coverage for trips into closed areas.

It is a stretch to claim that a low catch rate of Georges Bank haddock raises concerns about the status of the haddock quota – there could be other factors limiting the fleet’s ability to harvest more of the Georges Bank haddock quota. For example, increased fuel expenses to fish offshore, high lease rates for choke stocks that could be necessary to harvest the haddock, or possibly the movement of fish further offshore into Canadian waters. One could also argue that it does not make sense for fishermen to pay for a monitor so they can fish inside a closed area when they can fish immediately adjacent to the area for free.

Comment 8: Massachusetts Division of Marine Fisheries suggested that tying a specific research requirement to special access into a closed area through an exempted fishing permit would prevent timely access and unnecessarily complicate matters.

Response: We agree. We expect that any type of scientific assessment would take at least one year so that we could analyze and incorporate seasonal changes. As explained earlier, we are developing an exempted fishing permit program that would allow for a limited number of trips so that industry could then determine whether or not they could afford to pay for a monitor while fishing in the area. Data would also be reviewed to ensure that opening the area would not have a negative impact on Georges Bank cod or yellowtail flounder.

Comment 9: The Georges Bank Cod Fixed Gear Sector contends that requiring the standard level of monitoring coverage (currently 22 percent) is unnecessary when vessels are fishing selectively in the eastern and western portions of the Nantucket Lightship Closed Area.

Response: While we understand the point that the Sector is trying to make, selective gear is required in the area because groundfish are present. In fact, some sectors have requested the exemption so that they can target haddock with selective trawl gear. Because this is relatively new fishing effort in the areas, it is appropriate to keep the standard monitoring coverage level at this time.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Northeast Multispecies Fishery Management Plan, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order E.O. 12866.

Pursuant to the Regulatory Flexibility Act, and prior to the Small Business Administration's (SBA) June 20, 2013, final rule, a Final Regulatory Flexibility Analysis (FRFA) was prepared for this action, as required by section 604 of the Regulatory Flexibility Act, as part of the regulatory impact review. This analysis used SBA's former size standards. The FRFA describes the economic impact the interim rule would have on small entities. In the interim final rule, we determined that the new size standards did not affect the previously completed IRFA. Each of the statutory requirements of section 604(b) and (c) were addressed in the Classification section of the interim final rule. NMFS did not receive any comments on the FRFA during the comment period for the interim final rule, nor did it make any changes to the provisions implemented in the interim final rule. Therefore, no changes are necessary to the FRFA that was published with the interim final rule.

A small entity compliance guide for the interim measure, as required by Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996, was issued on December 12, 2013. This final rule makes no changes to the interim final rule. Therefore, NMFS is not re-issuing the previously distributed compliance guide. Small entities have been operating under the interim measure since December 31, 2013, so redistributing the previously issued compliance guide would likely result in confusion. A small entity compliance guide was sent to all holders

of Federal groundfish permits that are enrolled in a groundfish sector. In addition, copies of this final rule and guides (i.e., information bulletins) are available from NMFS (see ADDRESSES) and at the following website: <http://www.nero.noaa.gov/>.

Accordingly, the interim rule amending 50 CFR Parts 648 and 697 which was published at 78 FR 76077 on December 16, 2013, is adopted as a final rule without change.

Authority: 16 U.S.C. 1801 et seq.

Dated: April 15, 2014.

Paul N. Doremus,
Deputy Assistant Administrator for Operations,
National Marine Fisheries Service.

[FR Doc. 2014-09031 Filed 04/18/2014 at 8:45 am; Publication Date: 04/21/2014]